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April 24, 2020

VIA ECF

The Hon. Sarah Netburn
United States Magistrate Judge
Thurgood Marshall Courthouse
40 Foley Square, Room 430
New York, NY 10007

Re: *Rich v. Fox News Network LLC, et al.*, No. 18-cv-2223

Dear Judge Netburn:

Plaintiffs Joel and Mary Rich and Defendants Fox News Network LLC (“Fox”) and Malia Zimmerman (together with Fox, the “Fox Defendants”) jointly submit this letter regarding discovery, pursuant to the Court’s February 12, 2020 Order. *See* Docket No. 110.

Pending Motions

(1) The Fox Defendants’ motion to dismiss the negligent supervision and secondary liability claims has been fully briefed. The parties request that, if Judge Daniels intends to schedule a hearing on this motion in the next several weeks, it be conducted by telephone.

(2) *Pro se* defendant Ed Butowsky’s motion to dismiss on personal jurisdiction grounds has also been fully briefed. Judge Daniels has referred the motion to Judge Netburn for a report and recommendation.

Document Production

To date, Plaintiffs have produced 2030 documents; Malia Zimmerman has produced 623 documents; and Fox has produced 326 documents.

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Plaintiffs and the Fox Defendants this week submitted an amended protective order for the Court's review and approval. The proposed protective order allows the parties to designate certain categories of documents as "highly confidential." This amendment adds a layer of protection for documents that Fox News or Zimmerman intend to produce to Plaintiffs, but over which they assert a newsgathering privilege as to third parties. It also allows third parties to designate documents as highly confidential, which Fox News hopes will resolve some third-party concerns regarding confidentiality. Following the finalization of that protective order, the Fox Defendants expect to ramp up their document production. *Pro se* defendant Butowsky indicated to Fox that he was neither able to consent nor object to the amended protective order in light of ongoing health issues.

Pro se defendant Butowsky has not produced any documents in response to Plaintiffs' discovery requests and has stated that his health issues prevent him from doing so. In response to Fox News's document requests, Mr. Butowsky reproduced documents that he previously produced in a separate lawsuit brought by Plaintiffs' son, Aaron Rich, in the U.S. District Court for the District of Columbia. *See Rich v. Butowsky, et al.*, No. 18-cv-681. It does not appear to Fox News that Mr. Butowsky conducted any independent searches in response to its requests. The documents that Mr. Butowsky did produce contained significant production errors, namely duplicative Bates-stamping of different documents. Fox News is working to resolve those production issues and will produce those documents to Plaintiffs imminently. Mr. Butowsky has suggested that due to his health conditions he may be unable to participate meaningfully in the discovery process in the near future.

Third-Party Discovery

Plaintiffs have served third-party subpoenas on former Fox News employee Adam Housley, Fox Television Stations, LLC, Matt Couch, Verizon, AT&T, and Zoom. To date, the only third party that has produced documents in this matter is Rod Wheeler, in response to a subpoena from Fox News. Matt Couch has agreed that the documents he produced in Aaron Rich's case, where he is a defendant, may be produced to Plaintiffs. Pursuant to a subpoena issued in January, Fox News anticipates a production from Aaron Rich imminently. Fox News intends to serve document subpoenas on several more third parties, but it has refrained from attempts at in-person service given potential health concerns.

Discovery Disputes

At this time, the parties do not have any ripe discovery disputes for the Court to resolve. With that said:

(1) The parties disagree over which documents Fox News will produce relating to Ed Butowsky or Rod Wheeler. Plaintiffs believe that all documents related to these individuals from the designated Fox News custodians within the applicable date

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range are relevant within the meaning of Rule 26, while Fox News objects to producing documents relating to their involvement in news stories not at issue in the amended complaint. Fox contends those documents are irrelevant and, even if they were relevant, would be privileged.

At the March 10 hearing, the Court indicated it did not have enough information to resolve the dispute and directed the parties to agree on a format to log disputed documents. The parties disagree on whether the log should include documents withheld only on privilege grounds or also on relevance grounds. The parties are close to a compromise in which Fox News will provide Plaintiffs certain information about the disputed documents that will allow for Fox's objections as to relevance, burden, and proportionality be litigated. The parties are also attempting to narrow the scope of their dispute. Plaintiffs and Fox News will update the Court on the status of this dispute no later than May 27, 2020.

(2) Plaintiffs anticipate that there may be disputes over the Fox Defendants' assertion of newsgathering privilege, but those disputes must await production and review of Defendants' privilege logs. The Parties will update the Court regarding the status of any privilege disputes no later than May 27, 2020, as well.

(3) Plaintiffs were recently contacted by the lawyer representing *pro se* defendant Butowsky in other matters, Ty Clevenger. Mr. Clevenger agreed to keep Plaintiffs informed regarding Mr. Butowsky's health condition, which Mr. Butowsky has said currently prevents him from participating in this litigation. At this time, Plaintiffs are not seeking intervention from the Court and will update the Court by or before May 27, 2020 if that changes.

Third-Party Discovery Requests to Fox News in Other Litigation

The Fox Defendants wish to inform the Court of certain satellite litigation in the event it leads to additional motion practice, either in this Court or in the District of Columbia, in the coming weeks.

As discovery proceeds in this case, the Fox Defendants have been faced with multiple discovery requests from other litigants in their disputes with Mr. Butowsky in other courts, including from (1) National Public Radio and (2) Plaintiffs' son Aaron Rich. Aaron Rich has served document subpoenas on Plaintiffs and the Fox Defendants, as well as a deposition subpoena on Ms. Zimmerman, in his case against Mr. Butowsky in federal court in the District of Columbia.

The Fox Defendants are currently litigating a motion for protective order in the Aaron Rich litigation seeking to bar Ms. Zimmerman's third-party deposition in that matter. They are also continuing to negotiate with counsel for Aaron Rich concerning the scope of his document subpoenas.

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The Court may recall that, at the March 10 conference, counsel for Fox News raised concerns about the confidentiality protections in the Aaron Rich matter, given a story in the Daily Beast that seemed to involve confidential information from that case. Counsel for Aaron Rich has assured Fox News that they were not the source of that leak and asked that this Court be so informed. Though we accept that representation fully, counsel for Fox News continues to have concerns about the confidentiality of documents produced into that litigation.

Next Status Update

Plaintiffs and the Fox Defendants propose sending another status update to the Court on May 27, 2020, and will raise any additional issues then.

Sincerely,

A handwritten signature in blue ink, appearing to read 'E. Barron', followed by a horizontal line.

Elisha Barron
Counsel for Joel & Mary Rich

With consent,

Katherine Moran Meeks
WILLIAMS & CONNOLLY LLP
Counsel for Fox News Network, LLC

David Stern
DECHERT LLP
Counsel for Malia Zimmerman